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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ENRIQUE VARGAS-DURAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under Section 2L1.2 of the United States Sentencing Guidelines, an offense involving the "use" of physical force is a "crime of violence" only if the use of force was intentional.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-37a), is reported at 356 F.3d 598. The order of the court of appeals granting en banc rehearing (App., *infra*, 59a) is reported at 336 F.3d 418. The panel opinion of the court of appeals (App., *infra*, 38a-58a) is reported at 319 F.3d 194.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

1. Section 16 of Title 18 of the United States Code, titled "Crime of violence defined," provides, in relevant part, as follows:

> The term "crime of violence" means—
>
> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. Section 2L1.2 of the United States Sentencing Guidelines, titled "Unlawfully Entering or Remaining in the United States," provides, in relevant part, as follows:

> (a) Base Offense Level: **8**
>
> (b) Specific Offense Characteristic
>
> (1) Apply the Greatest:
>
> If the defendant previously was deported, or unlawfully remained in the United States, after—
>
> (A) a conviction for a felony that is * * * (ii) a crime of violence[,] * * * increase by **16** levels[.]
>
> * * * * *

3. Application Note 1(B)(iii) to Section 2L1.2 of the United States Sentencing Guidelines provides as follows:

> "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

4. At the time of the events relevant to this case, Section 49.07 of the Texas Penal Code Annotated (West 1994), titled "Intoxication Assault," provided as follows:

> (a) A person commits an offense if the person, by accident or mistake, while operating an aircraft, watercraft, or motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another.
>
> (b) In this section, "serious bodily injury" means injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.
>
> (c) An offense under this section is a felony of the third degree.

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Southern District of Texas of illegal reentry after having been deported following conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). He was sentenced to 64 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated respondent's sentence and remanded for resentencing.

1. While driving in an intoxicated state on a Texas street, respondent struck a pedestrian and then fled the scene. In 1996, as a result of that conduct, respondent was convicted of the felony offense of intoxication assault in a Texas court. Under Texas Penal Code Annotated § 49.07(a) (West 1994), a person commits that offense "if the person, by accident or mistake, while operating an aircraft, watercraft or motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another."[1] After his release from prison, respondent was deported to Mexico. App., *infra*, 2a-3a, 36a n.8.

2. On June 24, 2001, respondent was again found in Texas. He pleaded guilty to illegal reentry. The Presentence Investigation Report (PSR) recommended a 16-level increase in his offense level under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2001), on the ground that respondent had been deported after a conviction for a felony that is a "crime of violence." An application note to Section 2L1.2 defines "crime of violence" to include "an offense under federal, state, or local law

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[1] A subsequent amendment to the statute—in 1999—is immaterial to this case. See App., *infra*, 2a n.1, 41a n.3.

that has as an element the use, attempted use, or threatened use of physical force against the person of another" (*id.* § 2L1.2, comment. (n.1(B)(ii)(I)), and the PSR concluded that respondent's intoxication-assault conviction satisfies that definition.[2] The district court agreed and sentenced respondent to 64 months of imprisonment. App., *infra*, 3a-4a.

3. A divided panel of the court of appeals affirmed respondent's sentence. App., *infra*, 38a-58a. The majority held that the Texas statute's requirement of proof that the defendant "cause[d] serious bodily injury to another" (Tex. Penal Code Ann. § 49.07(a) (West 1994)) means that it "has as an element the use * * * of physical force against the person of another" (Sentencing Guidelines § 2L1.2, comment. (n.1(B)(ii)(I)) (2001)), and that intoxication assault is therefore a "crime of violence" under Section 2L1.2 of the Sentencing Guidelines. App., *infra*, 40a-42a. The majority rejected the contention of respondent, and of the dissenting judge (*id.* at 48a-58a), that intoxication assault is not a "crime of violence" because the Texas statute does not require the *intentional* use of force. *Id.* at 43a-47a.

4. After granting respondent's petition for rehearing, App., *infra*, 59a, a divided en banc court vacated respondent's sentence and remanded for resentencing, *Id.* at 1a-37a.

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[2] The definition of "crime of violence" in the current version of Section 2L1.2, see Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)), differs in form from the version applicable in this case (the 2001 version) but is identical in substance. See Sentencing Guidelines App. C, amend. 658.

a. The majority held that an offense has as an element the "use" of force if the statute requires that the defendant intentionally availed himself of the force. App., *infra*, 7a-13a. It reached that conclusion for three reasons. *Ibid.* First, because dictionary definitions of "use" contemplate "the application of something to achieve a purpose," the majority believed that "the plain meaning of the word * * * requires intent." *Id.* at 9a-10a. Second, because "crime of violence" is defined in Section 2L1.2 to include an offense that has as an element "the use, attempted use, or threatened use" of physical force, the majority thought that interpreting the "use" of force "as capable of being performed without intent" would "effectively nullify the state of mind required by 'attempted use' and 'threatened use,'" which both indisputably "require intent." App, *infra*, 10a. Third, the majority was of the view that interpreting the word "use" to require intent was "supported by [Fifth Circuit] caselaw," *ibid.*, including *United States* v. *Chapa-Garza*, 243 F.3d 921 (2001), which held that the Texas offense of driving while intoxicated was not a "crime of violence" under 18 U.S.C. 16(b) because that provision requires that the "use" of physical force be intentional. App., *infra*, 10a-12a.[3]

The majority then held that the intentional use of force is not an element of the crime of intoxication assault. App., *infra*, 13a-15a. The words "by accident or mistake" in the Texas statute, according to the majority, "plainly dispense with any *mens rea* require-

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[3] Under 18 U.S.C. 16(b), a "crime of violence" means any offense "that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

ment." *Id.* at 14a (citing *Stidman* v. *State*, 981 S.W.2d 227, 230 (Tex. Ct. App. 1998)). All that has to be proved, the court explained, "is an intoxicated driver's operation of a motor vehicle in a public place that results in a serious bodily injury to another." *Ibid.*[4]

b. Judge Emilio Garza filed a dissenting opinion, which was joined by Judge Barksdale. App., *infra*, 24a-37a. In Judge Garza's view, the majority had effectively inserted the word "intentional" before "use," an action he thought particularly inappropriate because the Sentencing Commission is explicit when it wishes to impose a *mens rea* requirement. *Id.* at 26a-31a. The Sentencing Commission, Judge Garza said, "does not understand the verb 'use' to inherently include any mens rea element," and the majority was therefore wrong to "impose a mens rea element upon that verb when the * * * Commission has declined to explicitly do so." *Id.* at 31a. Judge Garza also thought *Chapa-Garza* inapposite, because that case interpreted a different definition of "crime of violence." *Id.* at 31a-34a.[5]

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[4] Judge DeMoss filed an opinion concurring in part. App., *infra*, 16a-24a. He agreed that intoxication assault does not have as an element the use, attempted use, or threatened use of physical force, but he rejected the majority's reliance on *Chapa-Garza*. *Id.* at 16a-17a, 22a-24a.

[5] After the court of appeals issued its en banc decision, respondent filed a petition for a writ of certiorari (No. 03-9044), in which he asked this Court to overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). That case holds that the fact of a prior conviction that increases the otherwise-applicable statutory maximum sentence need not be charged in an indictment and proved to a jury beyond a reasonable doubt. The Court denied the petition on March 29, 2004. *Vargas-Duran* v. *United States*, 124 S. Ct. 1728.

REASONS FOR GRANTING THE PETITION

The issue in this case is similar to that presented in a case in which this Court recently granted review, *Leocal* v. *Ashcroft*, cert. granted, No. 03-583 (Feb. 23, 2004). The petition in this case should therefore be held pending the decision in *Leocal* and then disposed of accordingly.

The court of appeals construed the phrase "crime of violence" under Sentencing Guidelines § 2L1.2, which includes an offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)). The court held that an offense has as an element the "use" of physical force when it requires the defendant to "intentionally avail himself" of such force. App., *infra*, 7a. The court then held that the Texas offense of intoxication assault contains no such requirement and so is not a crime of violence under Section 2L1.2. *Id.* at 13a-15a.

In *Leocal* the issue is whether, in the absence of a mens rea of at least recklessness, the Florida offense of causing serious bodily injury by driving under the influence (Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2000)) is a "crime of violence" under 18 U.S.C. 16(a), which defines the term as an offense "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Because the definition of "crime of violence" in 18 U.S.C. 16(a) is identical to that in Sentencing Guidelines § 2L1.2, except that the former includes the phrase "or property," this Court's decision in *Leocal* will likely determine the correctness of the court of appeals' decision here.

This Court does not ordinarily grant review in cases involving the interpretation of a Sentencing Guidelines provision, because the Sentencing Commission can amend the Guidelines to eliminate a circuit conflict. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).[6] For a number of reasons, however, the considerations that usually counsel against review of a Guidelines issue are not present here. First, by granting review in *Leocal*, the Court has already agreed to interpret a statutory definition of "crime of violence" that is nearly identical to the Guidelines definition at issue here. There is no reason why these definitions should be interpreted differently. Second, in interpreting the term "use" of physical force in the definition of "crime of violence" in Sentencing Guidelines § 2L1.2, the court of appeals relied on an earlier Fifth Circuit decision (*Chapa-Garza*) that interpreted a similar term in the statutory definition (albeit the definition in Section 16(b) rather than 16(a)). See App., *infra*, 10a-12a.[7] The court of appeals' decision therefore turns, at least in part, on an interpretation of the statute. Third, the petition in this case does not ask the Court to address a Guidelines issue on the merits. It asks only that the petition be held pending the decision in a case the Court has already agreed to hear. If appropriate, the judg-

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[6] There is a circuit conflict on the Guidelines issue here. In its decision in this case, the Fifth Circuit rejected the Eighth Circuit's holding in *United States* v. *Gonzalez-Lopez*, 335 F.3d 793, cert. denied, 124 S. Ct. 591 (2003), that the definition of "crime of violence" in Sentencing Guidelines § 2L1.2 "does not contain a volitional element." *Id.* at 799. See App., *infra*, 10a-11a n.6, 24a n.1.

[7] Under Section 16(b), "crime of violence" means a felony offense that, by its nature, involves a substantial risk that "physical force against the person or property of another may be used" in the course of committing the offense.

ment of the court of appeals can then be vacated and the case remanded for further consideration in light of *Leocal*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Leocal* v. *Ashcroft*, No. 03-583, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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MAY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20116

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ENRIQUE VARGAS-DURAN, DEFENDANT-APPELLANT

Jan. 8, 2004

Before: KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DEMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

This appeal contemplates the application of a sentence enhancement to a defendant's sentence for being unlawfully present in the United States in violation of 8 U.S.C. § 1326 (2000). The Pre-Sentencing Report ("PSR") recommended that a sixteen-level enhancement be added to a base offense level of eight because Enrique Vargas-Duran ("Vargas-Duran") previously had been convicted of intoxication assault under Texas law. Vargas-Duran objected to the enhancement, arguing it was improper because intoxication assault was not a crime of violence under § 2L1.2 of the U.S.

Sentencing Guidelines Manual ("U.S.S.G."). The district court agreed with the PSR's recommendation and enhanced Vargas-Duran's sentence. On appeal, a majority of a panel of this Court affirmed the district court, holding that intoxication assault required the use of force, and, as such, met the U.S.S.G. definition of a crime of violence.

This Court now examines and clarifies the law with respect to sentencing enhancements which require "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, Application Note 1(B)(ii)(I) (2001). We hold that the "use" of force requires that a defendant intentionally avail himself of that force. We further hold that the intentional use of force must be an element of the predicate offense if the predicate offense is to enhance a defendant's sentence. Because the intentional use of force is not an element of the crime of Texas intoxication assault, we VACATE Vargas-Duran's sentence and REMAND his case for resentencing in accordance with this opinion.

I. FACTS AND PROCEEDINGS

In 1996, Vargas-Duran, a citizen of Mexico, was convicted of intoxication assault in Texas state court. Under the Texas statute, a person was guilty of intoxication assault when that person, "by accident or mistake, while operating an aircraft, watercraft or motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another." Tex. Penal Code Ann. § 49.07 (1994).[1]

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[1] The 1999 amendment to this statute is of no moment to this appeal.

Following his conviction and sentence, Vargas-Duran was deported from Hidalgo, Texas to Mexico.

On June 24, 2001, Vargas-Duran was again found in Texas. He pleaded guilty to being unlawfully present in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2).[2] A PSR was prepared using the 2001 version of the Federal Sentencing Guidelines. The base

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[2] Section 1326, title 8, states in pertinent part:

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a)1 of this section, in the case of any alien described in such subsection—

. . .

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both[.]

level of Vargas-Duran's offense was eight; the PSR recommended a sixteen-level enhancement pursuant to U.S.S.G. § 2L1.2. Section 2L1.2(b)(1)(A)(ii) provides for a sixteen-level enhancement if "the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is a . . . crime of violence." The Application Notes define "crime of violence" either as one of a list of enumerated offenses or as "an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. Application Note 1(B)(ii)(I). The PSR recommended that Vargas-Duran's 1996 conviction for intoxication assault be considered a crime of violence for purposes of enhancing his sentence.

The district court agreed with the PSR. In adopting the PSR's recommendation, the district court sentenced Vargas-Duran to a sixty-four month term of imprisonment and a three-year term of supervised release. Vargas-Duran timely appealed.

On January 16, 2003, a majority of a panel of this Court affirmed the enhancement of Vargas-Duran's sentence. *United States v. Vargas-Duran*, 319 F.3d 194, 199 (5th Cir. 2003), *vacated and reh'g granted by* 336 F.3d 418 (5th Cir. 2003). As a preliminary matter, the panel majority observed that because intoxication assault is not one of the enumerated offenses under § 2L1.2, Vargas-Duran's sentence could only be enhanced if the crime of intoxication assault had "as an element the use, attempted use, or threatened use of physical force against the person of another." 319 F.3d at 196 (citations omitted). Next, the majority reiterated the rule that this Court "need not discuss the facts

underlying Vargas-Duran's prior conviction, since we 'look only to the fact of conviction and the statutory definition of the prior offense' to determine whether a prior conviction qualifies as a predicate offense for sentencing enhancement purposes." *Id.* (citations omitted).

Because intoxication assault requires that an intoxicated offender "cause [] serious bodily injury to another," the majority concluded that the crime has as an element the use of force. 319 F.3d at 196. Observing that neither Vargas-Duran nor any Texas decision gave an example of an instance in which a defendant was convicted of intoxication assault *without* using physical force against a person, the majority concluded that causing serious bodily injury "qualifie[d]" as using force. *Id.* at 196-97.

Vargas-Duran's primary contention was that "use of force" implied the intentional use of force. Relying on this Court's decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001), in which we held that the sentence of a defendant with a prior conviction for driving while intoxicated ("DWI") could not be enhanced as a crime of violence, Vargas-Duran argued that the approach endorsed by *Chapa-Garza* similarly should apply to intoxication assault. 319 F.3d at 197.

The majority disagreed with Vargas-Duran's proposed use of *Chapa-Garza* on three grounds. First, the majority distinguished *Chapa-Garza* by observing that *Chapa-Garza* did not purport to interpret § 2L1.2.[3] 319

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[3] *Chapa-Garza* was decided under 18 U.S.C. § 16(b), a predecessor of § 2L1.2 (the guideline at issue in the present appeal). Chapa-Garza's sentence was enhanced by the district court because it determined that DWI was an aggravated felony. An

F.3d at 197. As a second point of distinction, the majority pointed out that the crime of felony DWI, which is committed when a defendant with two prior convictions begins operating a vehicle while intoxicated, could be committed without the use of force. *Id.* at 198. As a third point of distinction the majority emphasized that the felony DWI statute at issue in *Chapa-Garza* was not analyzed under 18 U.S.C. § 16(a), the language of which is similar to § 2L1.2, Application Note 1(B)(ii)(I). *Id.* The majority characterized § 16(b), under which *Chapa-Garza was* decided, as a "catch-all" provision, and opined that "*Chapa-Garza*'s analysis of § 16(b) would have been entirely unnecessary had the crime of Texas felony DWI contained as an element the 'use of force,' as does the Texas crime of intoxication assault at issue in this case." *Id.* The majority therefore concluded that "[i]n light of the plain language of the revised guideline and its commentary," no state of mind requirement should be implied in § 2L1.2. *Id.* at 199.

The dissent from the panel majority's ruling in *Vargas-Duran* argued that "use", by its very definition, requires intent. 319 F.3d at 201 (Clement, J., dissenting). Because intoxication assault encompasses an act that takes place "by accident or mistake", the dissent reasoned that intoxication assault does not neces-

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aggravated felony was, in turn, defined as, among other things, a crime of violence. Section 16(b) of Title 18 provided that a crime of violence was "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Cf.* § 2L1.2 (2000) (defining a crime of violence as "an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another").

sarily require the use, attempted use, or threatened use of force. *Id.* at 204.

Vargas-Duran timely filed a petition for rehearing *en banc* on January 30, 2003. By court order, rehearing *en banc* was granted on June 26, 2003, and the panel opinion was vacated. *United States v. Vargas-Duran*, 336 F.3d 418 (5th Cir. 2003).

II. STANDARD OF REVIEW

Because the grant of *en banc* rehearing vacates the earlier panel decision, we review *de novo* a district court's legal conclusions or interpretations of the meaning of a guideline. *United States v. Griffin*, 324 F.3d 330, 365 (5th Cir. 2003). We therefore review a challenge to the district court's application of § 2L1.2 *de novo*. *United States v. Rodriguez-Rodriguez*, 323 F.3d 317, 318 (5th Cir. 2003).

III. DISCUSSION

A. "Use of Force"

The first issue before the Court is whether "the use, attempted use, or threatened use of physical force against the person of another," U.S.S.G. § 2L1.2, Application Note 1(B)(ii)(I), means that the predicate offense requires that a defendant intentionally avail himself of that force. We hold that it does.

It is an elementary rule of statutory construction that "the words of a statute will be given their plain meaning absent ambiguity." *Texas Food Indus. Ass'n v. United States Dept. of Agric.*, 81 F.3d 578, 582 (5th Cir. 1996). Similarly, a statute should be construed such that no word is left without operative effect. *Texaco Inc. v. Duhe*, 274 F.3d 911, 920 (5th Cir. 2001).

We are bound to follow each Sentencing Guideline; commentary is also authoritative if not plainly erroneous or inconsistent with the guidelines. *United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir. 2002). Guidelines, and thus their commentary, are subject to the ordinary rules of statutory construction. *United States v. Carbajal*, 290 F.3d 277, 283 (5th Cir. 2002).

Because "use" is not defined by the Sentencing Guidelines, we first look to its plain meaning. Beginning with the definition as commonly understood within the legal community, "use" means "[t]he application or employment of something." BLACK'S LAW DICTIONARY 1540 (7th ed. 1999). In more broad-based English application, "use" is defined as "[t]he act of employing a thing *for any . . . purpose;* the fact, state, or condition of being so employed; utilization or employment for or *with some aim or purpose*, application or conversion *to some . . . end*." 19 THE OXFORD ENGLISH DICTIONARY 350 (2d ed. 1989) (emphasis added).[4]

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[4] Lest this Court be accused of selectively defining "use" to comport with the result reached in this case, we hasten to add that other dictionaries have similarly defined the term. According to The American Heritage Dictionary, "use" means "[t]o put into service or apply for a purpose; employ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1894 (4th ed. 2000). The verb form of "use" as stated in the Encarta World English Dictionary is defined as meaning "to employ something for some purpose or to put something into action or service," while the noun form is defined as "the act of using something for a particular purpose." ENCARTA WORLD ENGLISH DICTIONARY 1956 (1999). One Webster's dictionary gives the primary definition of "use" as "the act or practice of employing something," and a secondary definition as "to put into action or service: avail oneself of: employ." WEBSTER'S NEW COLLEGIATE DICTIONARY 1279 (6th ed. 1979). Finally, "use" has been defined as "the act or practice of using something:

Similarly, another dictionary observes that "SERVICE, ADVANTAGE, PROFIT, ACCOUNT, AVAIL, and USE have in common a sense of a useful or valuable *end, result, or purpose.* USE stresses the practicality of the end, result, or *purpose* for which something is employed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2523 (1993) (emphasis added).[5] The overwhelming majority of authority on the plain meaning of "use" contemplates the application of something to achieve a purpose. Supplementing the word "force" in place of the indeterminate object "something" in the aforementioned dictionary definition bears out this meaning: "use of force" means "the act of employing force for any . . . purpose," or "to avail oneself of force." Because we conclude that the meaning of "use of force" is free of ambiguity, we therefore hold

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employment," or "to put into action or service." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2523 (1993).

[5] We recognize that a member of this Court in dissenting from our denial of *en banc* rehearing in *United States v. Chapa-Garza*, 262 F.3d 479, 482 (5th Cir. 2001), used an earlier Webster's dictionary synonym explication of "use" to buttress his claim that "without question, force may be used accidentally." The dissent observed that "Webster's list of synonyms specifies 'USE is general and indicates any putting to service of a thing, *usu.* for an intended or fit purpose'. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Merriam-Webster 1986). This suggests, of course, that a purpose is not always intended." *Id.* at 482, n. 2. As the more recent edition of Webster's Third New International Dictionary of the English Language Unabridged omits the "usually" adverbial restriction on purpose, we believe the clear weight of authority suggests that "use of force" requires that one intentionally avail himself of that force.

that the plain meaning of the word "use" requires intent.

Our adoption of the plain meaning of "use" is further supported by the rule of statutory interpretation that requires us, when possible, to give each word in a statute operative effect. This rule of construction dictates that the word "use" must have an operative effect when left standing alone, or when modified by either "attempted" or "threatened." Both an attempt and a threat require intent. *See* BLACK'S LAW DICTIONARY 123, 1489 (7th ed. 1999) (defining "attempt" and "threat"). Were we to interpret "use of force" inconsistently with its plain meaning—that is, as capable of being performed without intent—we would effectively nullify the state of mind required by "attempted use" and "threatened use." For how could one intentionally attempt to unintentionally use force, or intentionally threaten to unintentionally use force? The force, so to speak, of this rhetorical question only bolsters our belief that "use" requires intent.

Our adoption of the plain meaning of the word "use" is supported by our caselaw as well.[6] In *United States*

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[6] There is a Circuit split on the issue of whether "use of force" in the context of Sentencing Guidelines requires intent. *See United States v. Lucio-Lucio*, 347 F.3d 1202, 1205-06 (10th Cir. 2003) (ruling that the "use of force" contemplated by § 16(b) "carries a connotation of at least some degree of intent"); *Bazan-Reyes v. INS*, 256 F.3d 600, 609, 611 (7th Cir. 2001) (holding that "use of force" as contemplated by § 16(a) and § 16(b) requires intentional use). *But see United States v. Gonzalez-Lopez*, 335 F.3d 793, 799 (8th Cir. 2003) (holding that "the definition of crime of violence contained in § 2L1.2(b)(1) does not contain a volitional element"); *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (finding that designation of an offense as a

v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001), we held that the crime of felony DWI under Texas law was not a crime of violence, because "[*i*]*ntentional* force against another's person or property is virtually never employed to commit this offense." *Id.* at 927. At issue in *Chapa-Garza* was whether felony DWI fit within the 18 U.S.C. § 16(b) definition of crime of violence as an offense "that is a felony and that, by its nature, involves a substantial risk that *physical force* against the person or property of another *may be used* in the course of committing the offense." *Id.* at 924 (citations omitted) (emphasis added). We first declined to read § 16(b) in the same way in which we read U.S.S.G. § 4B1.2(a)(2). *Id.* at 926. Although we hinged that decision on § 16(b)'s emphasis on the use of force during the commission of the offense, an equally valid basis for distinction is the fact that § 4B1.2(a)(2) does not mention *either* "use" or "force." *Id.* at 925. We went on to avow that "[t]he criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental, unintended event." *Id.* at 926. Relying in part on the Third Circuit's elucidation of "use of force" in *United States v. Parson*, 955 F.2d 858 (3rd Cir. 1992), we concluded that the dictionary definitions of "use" indicate that the word "refers to volitional, *purposeful*, not accidental, employment of whatever is being 'used'." 243 F.3d at 926.

Nothing in our opinion in *Chapa-Garza* encouraged a reading restricting our plain-meaning analysis of the word "use" to the context of only § 16(b). Section 16(b)'s dictate that "physical force . . . may be used"

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crime of violence does not require the intentional use of force; recklessness will suffice).

does not differ substantially from § 2L1.2's "use of force" requirement. The distinction we made between the application of force against the body of another does not necessarily mean that the use of that force was intentional.

Indeed, an example given in *Chapa-Garza* is not unlike the crime of intoxication assault. In the example posited, we believed that force was *not* intentionally used. We observed that

> [w]hile the victim of a drunk driver may sustain physical injury from physical force being applied to his body as a result of collision with the drunk driver's errant automobile, it is clear that such force has not been intentionally "used" against the other person by the drunk driver at all, much less in order to perpetrate any crime, including the crime of felony DWI.

243 F.3d at 927. The distinction we made then between force applied against the body of another and force intentionally used against the body of another is one we uphold here.

Our ruling today is also consistent with the result we reached in *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002). Gracia-Cantu's sentence was enhanced for a prior Texas felony conviction for injury to a child,[7] which the PSR claimed constituted a crime of violence. 302 F.3d at 311. On appeal, it was persuasively argued

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[7] Injury to a child is committed when a person "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury." Tex. Penal Code Ann. § 22.04(a) (2002).

by Gracia-Cantu and eventually conceded by the Government that § 16(a) was inapplicable to Gracia-Cantu's predicate offense because "the statutory definition of the offense does not explicitly require the application of force as an element." *Id.* at 312. Although we did not further address § 16(a) because of this concession, we now observe that this interpretation of § 16(a) is consistent with our view that "use of force" requires intent.[8]

B. "An Element"

Because the panel held that the use of force was an element of the offense of intoxication assault, we turn now to address whether the intentional use of force is an element of the crime of intoxication assault. We hold that it is not.

As we have earlier noted, § 2L1.2 allows enhancement when the statute has "as an *element* the use, attempted use, or threatened use of force." U.S.S.G. § 2L1.2, Application Note 1(B)(ii)(I) (2001) (emphasis added). Thus, Vargas-Duran's sentence enhancement depends not only upon the meaning of the word "use", but also upon whether the predicate offense has the use of force as an element of the crime.[9] In our current legal terminology, an element is "[a] constituent part of a claim that must be proved for the claim to succeed."

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[8] This interpretation also comports with our assessment, *infra*, that not only must force be used intentionally, but such use must also be "an element" of the predicate offense.

[9] The panel explicitly ruled that "[b]ecause the Texas crime of intoxication assault has *as an element* the use of force against the person of another, we conclude that the district court did not err in imposing the 16-level enhancement." *United States v. Vargas-Duran*, 319 F.3d 194, 199 (5th Cir. 2003) (emphasis added).

Black's Law Dictionary 538 (7th ed. 1999). Thus, in order for § 2L1.2 to apply, the intentional use of force must be "a constituent part of a claim that must be proved for the claim to succeed." *See United States v. Williams*, 343 F.3d 423, 432 (5th Cir. 2003) (observing that "[t]raditionally, an 'offense' was defined by its 'elements,' i.e., facts necessary to support a conviction for the offense"). If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element—implicit or explicit—of the crime. More specifically, in the case of Vargas-Duran, intentional use of force would have to be an element of the crime of intoxication assault—that is to say that no conviction would be upheld absent proof that the defendant intentionally used force against the person of another. But a requirement that a defendant intentionally use force is simply not an element that needs to be proved under Texas law.

The Texas crime of intoxication assault requires that a prosecutor prove that the defendant (1) by accident or mistake, (2) while operating a motor vehicle in a public place while intoxicated, (3) by reason of that intoxication causes serious bodily injury to another. Tex. Penal Code Ann. § 49.07 (1994). Texas courts have held that the very words "by accident or mistake" plainly dispense with any *mens rea* requirement. *Stidman v. State*, 981 S.W.2d 227, 230 (Tex. App. 1998). Therefore, all that need be proved for a conviction is an intoxicated driver's operation of a motor vehicle in a public place that results in a serious bodily injury to another. No *mens rea* need be established for prosecution.[10]

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[10] Our ruling on the "element" requirement of this Sentencing Guideline is consistent with that of the Second Circuit in

Further, the fact that the statute requires that serious bodily injury result from the operation of a motor vehicle by an intoxicated person does not mean that the statute requires that the defendant have used the force that caused the injury. All that the statute requires is that a bodily injury occur and that the injury was causally linked to the conduct of the defendant. No facts beyond these need be established in order for a conviction to lie.

Looking only at the fact of Vargas-Duran's conviction and the statutory definition of intoxication assault, it is clear that the intentional use of force against the person of another is not a necessary component of the offense. The prosecution of Vargas-Duran for the predicate offense in no way rested on proof of any *mens rea*, much less intent. There is also a difference between a defendant's causation of an injury and the defendant's use of force. Consequently, Vargas-Duran's use of force was simply not a fact necessary to support his conviction for intoxication assault. Because the use of force is not an element of the offense of intoxication assault, Vargas-Duran's sentence was improperly enhanced.

IV. CONCLUSION

For the foregoing reasons, the enhanced sentence applied by the district court is VACATED, and we

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Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). In *Chrzanoski*, the Government argued that, while the state statute in question did not expressly identify "the use, attempted use, or threatened use" of physical force as an element, it was implicit in the statute's requirement that physical injury be caused. *Id.* at 193. The Second Circuit rejected the Government's argument and concluded that there was a difference between the use of force and the causation of injury. *Id.* at 194. We agree.

REMAND this case for resentencing in accordance with this opinion.

DEMOSS, Circuit Judge, Specially concurring in part:

I agree with Judge Clement's majority opinion that under the definition of "crime of violence" in the 2001 version of U.S.S.G. § 2L1.2 the predicate offense here in *Vargas-Duran* (*i.e.*, intoxication assault under Tex. Pen. Code Ann. § 49.07) is not a "crime of violence" because:

A. That predicate offense is not specifically named in the Guideline definition; and

B. That predicate offense does not have as an element "the use or attempted use or threatened use of physical force against the person of another," as Judge Clement so clearly articulates in Part IIIB of her majority opinion.

I reach this conclusion because neither the word "use" nor the word "force" nor the word "attempted" nor the word "threatened" appears anywhere in the text of the statute defining this predicate offense; nor should these terms be read into that statute by inference.

However, I agree with Judge Garza's dissent that we should not make this decision by relying upon our prior holding in *Chapa-Garza* because:

A. That opinion was issued prior to the issuance of the new U.S.S.G. § 2L1.2 in 2001; and

B. This new definition of "crime of violence" does not have any cross- reference to either 8 U.S.C. § 1101(a)(43)(F), nor to 18 U.S.C. § 16(a) or (b), nor to U.S.S.G. § 4B1.2, as did the version of

§ 2L1.2 which was applicable at the time *Chapa-Garza* was decided.

I find myself in a straddle position, agreeing with the result of Judge Clement's opinion, but disagreeing with Part IIIA of her opinion in which she relies on *Chapa-Garza* to interpret the language of Application Note 1(B)(ii)(I) as requiring an "intentional use of force." Likewise, I disagree with Judge Garza's interpretation of Tex. Pen. Code Ann. § 49.07 as containing as an element thereof the "use or threatened use or attempted use of physical force against the person of another" so as to come within the language of Note 1(B)(ii)(I), but I agree with much of his dissent, which reviews the history and purpose of the complete change made by the Sentencing Commission in 2001 in the text of § 2L1.2 and the importance of construing the definitions of "crime of violence" and "aggravated felony" as set forth therein as new separate free standing definitions.

Given that the district courts of the Fifth Circuit handle more illegal alien cases than other district courts (and our Circuit sees more appeals of these cases than any other Circuit) and given that most of these illegal alien cases involve defendants with prior criminal convictions, I think it would be appropriate, time-saving, and cost-effective to set forth for the benefit of the bench and bar some ground rules and procedures for applying the new § 2L1.2. Towards that end I make the following suggestions:

Ground Rules for Interpretation

1. The definitions in Application Note 1(B) of § 2L1.2 are expressly limited to subsection (b)(1) of that Guideline.

2. The definition of "crime of violence" in Application Note 1(B)(ii) was inserted by the Sentencing Commission in 2001 and differs significantly from other definitions of "crime of violence" in the criminal code and in the Guidelines. Therefore, any interpretation of this definition in *Vargas-Duran* should not be derived from other statutes or guidelines where other definitions of that term are used; and any interpretation here in *Vargas-Duran* is applicable only to cases applying the § 2L1.2 Guideline. Similarly, definitions of "crime of violence" prior to the 2001 amendments to § 2L1.2 are no longer applicable to sentencing after November 1, 2001, under that Guideline.

3. The new definition of "aggravated felony" in Application Note 2 of § 2L1.2 is expressly limited to subsection (b)(1)(C) of that Guideline; and therefore any interpretation of that term here in *Vargas-Duran* should not be derived from other statutes or guidelines which define that term differently; and any interpretations here in *Vargas-Duran* are applicable only to cases applying § 2L1.2. Likewise, prior definitions of the term "aggravated felony" under prior versions of § 2L1.2 are no longer controlling.

4. In adopting the new definitions of "crime of violence" and "aggravated felony" in the 2001 Guidelines, the Sentencing Commission clearly

intended to change the type of predicate offenses which would qualify as a "crime of violence." Therefore, we should strictly construe the language used in the 2001 version of "crime of violence" particularly as defined by (B)(ii)(I).

5. In comparing the language used in the new definition of "crime of violence" it should be noted that:

   A. Not all of the specifically named offenses in subpart (II) meet the definitional test in subpart (I), which should lead to the conclusion that the specifically named crimes take precedence over the definition; and

   B. The definition in subpart (I) is identical to 18 U.S.C. § 16(a) except that it omits the words "or property" after the word "person;" which leads to the conclusion that a crime against property which is not specifically named in subpart (II) *cannot* be a crime of violence under subpart (I).

   C. The list of specifically named offenses in subpart (II) is the same as the list of offenses which are crimes of violence under the definition in Application Note § 4B1.2, but none of the definitions in § 2L1.2 include any of the other definitions of a "crime of violence" which appear in § 4B1.2, which focus on "conduct that by its nature, presented a serious potential risk of physical injury to another." This difference clearly indicates that in determining what constitutes a "crime of violence" under subpart (I) of § 2L1.2, we

> should not consider 18 U.S.C. § 16(b) which focuses on conduct that "by its nature involves a substantial risk that physical force may be used against another" or § 4B1.2 which focuses on "conduct that presents a serious potential risk of physical injury to another."

In view of the foregoing, I propose that we craft a clear and methodical approach for determining sentencing enhancements under the current § 2L1.2 for the benefit of the bench and bar. In so doing, it is important to reemphasize that in rendering this proposal for construing the provisions of § 2L1.2, I am not suggesting that we attempt to arrive at a one-size-fits-all definition of "crime of violence" that purports to apply to other guideline provisions which utilize the crime of violence terminology. Rather, this is a provision-specific proposal that hopefully adds a little clarity to a much muddled area of the law.

In determining the appropriate sentencing enhancement under § 2L1.2, the Guidelines direct courts to "apply the greatest" of the enhancement levels, beginning with the 16-level and ending with the 4-level enhancement. Therefore, whenever the issue for enhancement involving a potential "crime of violence" under § 2L1.2 is raised, I would determine the appropriate enhancement level as follows:

> *Step 1:* I would determine whether the predicate offense is one of the specifically named offenses found in Application Note 1(B)(ii)(II), which includes "murder, manslaughter, kidnaping, aggravated assault, forcible sex offenses (including sexual

abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." If the predicate offense at issue is one of these listed offenses, a 16-level enhancement is appropriate and no further analysis is required.

Step 2: If the predicate offense is not a specifically named, per se "crime of violence," I would then refer to the general definition found in Application Note 1(B)(ii)(I), which defines "crime of violence" as "an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." In determining whether the predicate offense falls under this guideline definition, I would look *only* to the text of the statutory provision at issue to identify whether the requisite element is present. If the statutory definition does not contain such an element, *i.e.*, the use, attempted use, or threatened use of physical force against the person of another, then analysis under the 16-level enhancement is complete, making appropriate an analysis of the predicate offense under the 8-level "aggravated felony" definition.[1]

Step 3: To determine whether the predicate offense constitutes an "aggravated offense" warranting an 8-level enhancement, the court should look to the definition provided by 8 U.S.C. § 1101(a)(43), which retains and restores the analysis of 18 U.S.C. § 16(a)

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[1] I recognize that there exists an intermediate 12-level enhancement for felony drug trafficking offenses that carry a sentence exceeding 13 months; however, for the purposes of our inquiry in *Vargas-Duran*, I have not included this relatively straightforward enhancement in my discussion.

and (b). Under § 16(a) and (b), a predicate offense is an "aggravated felony" if it either "has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" or is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Step 4: If the predicate offense is a felony conviction that does not meet the definitional standard for "aggravated felony" as provided by § 1101(a)(43), the offense automatically receives a 4-level enhancement pursuant to § 2L1.2(b)(1)(D).

Step 5: Finally, if the predicate offense is not a felony but rather an aggregate of three or more misdemeanors deemed to be crimes of violence or drug trafficking offenses, the defendant is subject to a 4-level enhancement.

Applying Step 1 of this proposed methodology to the facts in *Vargas-Duran*, it is clear that intoxication assault is not one of the specifically named offenses found in Application Note 1(B)(ii)(II). Therefore, the focus of analysis is on Step 2 to determine whether the statute at issue "has as an element the use, attempted use, or threatened use of physical force against the person of another." One is guilty of intoxication assault in Texas if he "by accident or mistake . . . while operating a motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another." Tex. Pen. Code Ann. § 49.07(b). Nowhere in the text of that statute does there exist an element contemplating the use, attempted use, or threatened use of physical force nor can

such an element be read into the statute. The guidelines simply command us to extend our analysis no further than the statutory elements. Therefore, intoxication assault cannot be a "crime of violence" and a 16-level enhancement is improper.

I would next move on to Step 3 and analyze intoxication assault under the lens of an "aggravated felony." Application Note 2 refers us to § 16(a) and (b) where we must decide whether intoxication assault fits within either statutory definition. Section 16(a) is a near identical recitation of the general definition of "crime of violence" found in Application Note 1(B)(ii)(I). The only meaningful difference is the inclusion of one's property in the former. Therefore, as I have already determined that intoxication assault does not involve using, attempting to use, or threatening to use physical force against the person of another, we can similarly conclude that intoxication assault does not contemplate the use of such force against the *property* of another. Accordingly, I focus on § 16(b).

Section 16(b) applies if the predicate offense is a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." It seems clear to me that this broader definition, which includes such terms as "substantial risk" and "may be used," is sufficient to capture the nature of the conduct in the intoxication assault statute. There is certainly a substantial risk that someone may suffer serious bodily injury as a result of an intoxicated driver's operation of a motor vehicle, whether or not physical force is used in committing the offense. Therefore, because intoxication assault falls under the

definition of an "aggravated felony" as contemplated by the Sentencing Guidelines, Vargas-Duran's sentence is subject to an 8-level enhancement.

Bottom line, I would vacate the 16-level enhancement imposed by the district court and remand the case back with specific instructions to apply the 8-level enhancement in accordance with the methodology set forth herein.

EMILIO M. GARZA, Circuit Judge, joined by RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

The court's opinion holds that "use" within the context of U.S. Sentencing Guidelines Manual § 2L1.2 (2001) means "intentional use."[1] This holding is inconsistent with the plain language of the sentencing guidelines, and it leads to unsound results for other guidelines where the Sentencing Commission actually includes mens rea elements modifying the term "use."

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[1] There is confusion among the circuit courts regarding the mens rea requirements for "use of force." *Compare United States v. Gonzalez-Lopez*, 335 F.3d 793, 798-99 (8th Cir. 2003) (holding that "crime of violence" under the 2001 version of U.S.S.G. § 2L1.2 contains no volitional element); *Park v. I.N.S.*, 252 F.3d 1018, 1021-23 (9th Cir. 2001) (holding that a crime of violence under § 16(a) and (b) does not require specific intent); *Tapia Garcia v. I.N.S.*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (similar holding); *United States v. Santana- Garcia*, 211 F.3d 1271, No. 98-2235, 2000 WL 491510, at *2-3 (6th Cir. Apr. 18, 2000) (unpublished) (similar holding); *Le v. U.S. Attorney Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999) (similar holding); *with Bazan-Reyes v. INS*, 256 F.3d 600, 608-12 (7th Cir. 2001) (relying on definition of "use" as an intentional act to hold that state crimes of DWI and homicide by intoxicated use of a vehicle were not "crimes of violence" under 18 U.S.C. § 16(b)); *Dalton v. Ashcroft*, 257 F.3d 200, 206-08 (2d Cir. 2001) (holding that "use" is an intentional act); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (similar holding).

Further, this holding ignores the Sentencing Commission's recent revision of U.S.S.G. § 2L1.2, and is inconsistent with the rationale of *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). Absent this Court's addition of the mens rea element of intent to the verb "use," it is clear that the Texas intoxication assault statute is a crime of violence for purposes of U.S.S.G. § 2L1.2. Accordingly, I respectfully dissent.

The 2001 version of U.S.S.G. § 2L1.2, under which Vargas-Duran was sentenced, provides a 16-level sentence enhancement to a base offense level of 8 "[i]f the defendant previously was deported, or unlawfully remained in the United States, after—(A) a conviction for a felony that is . . . (ii) a crime of violence. . . ." U.S.S.G. § 2L1.2(b)(1)(A)(ii). Application Note 1 of the guideline defines "crime of violence" for purposes of § 2L1.2(b)(1) as "an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. . . ." U.S.S.G. § 2L1.2, cmt. n.1(B)(ii)(I) (2001).[2]

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[2] The complete text of the 2001 version of § 2L1.2's crime of violence definition for purposes of subsection (b)(1) is:

> "Crime of violence"—
>
> (I) means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and
>
> (II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

U.S.S.G. § 2L1.2 cmt. n.1(B)(ii) (2001).

Despite the plain language of the § 2L1.2 crime of violence definition, the court's opinion inserts the word "intentional" before the word "use." There is no mens rea language with respect to the "use of force" element in the § 2L1.2 definition. *Cf. United States v. Gonzalez-Lopez*, 335 F.3d 793, 798 (8th Cir. 2003) ("[T]he text of the [§ 2L1.2] definition mentions only the actus reas [sic] and is silent as to the mens rea—or intent element."). Although there is a presumption that *criminal statutes* include an element of mental culpability, and strict liability crimes are disfavored, *see, e.g., Staples v. United States*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L.Ed.2d 608 (1994), the "use of force" requirement in § 2L1.2 is part of a strict liability 16-level *sentencing enhancement* and not part of a strict liability *criminal statute*. *See United States v. Singleton*, 946 F.2d 23, 26 (5th Cir. 1991) ("Singleton was not convicted of a strict liability *crime* but instead was subject to a strict liability *sentencing enhancement*.") (emphasis in original). Even though criminal intent is a required part of the crime constituting the defendant's underlying conviction, criminal intent is not necessarily a consideration for the district court in the sentencing phase. *Id.* at 26-27. Thus, whether the district court must consider the mens rea of the defendant's underlying conviction depends upon the language of the sentencing guidelines.

"The guidelines drafters have been explicit when they wished to import a mens rea requirement." *Singleton*, 946 F.2d at 25. The crime of violence definition under U.S.S.G. § 2L1.2 contains no mens rea language. In contrast, the other section within subpart 2L1 of the sentencing guidelines does include mens rea language. *See* U.S.S.G. § 2L1.1(b)(5) ("If the offense involved

intentionally or *recklessly* creating a substantial risk of death or serious bodily injury to another person . . . .") (emphasis added).[3] Previously, this Court has refused to read a mens rea requirement into a sentencing guideline absent explicit direction to do so. *See United States v. Fry*, 51 F.3d 543, 546 (5th Cir. 1995) (holding that, where "the language of section 2K2.1(a)(3) makes no reference to the defendant's mental state, . . . [t]he section is plain on its face and should not . . . be read to imply a scienter requirement."); *Singleton*, 946 F.2d at 25 ("Because statutory sections are to be construed as coherent wholes, the precision of the drafters in including mens rea in neighboring sections indicates that the reason that [§ 2K2.1] does not use the word 'knowingly' is that

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[3] *See also* U.S.S.G. § 2L2.1(b)(3) ("If the defendant *knew, believed, or had reason to believe* that a passport or visa was to be used to facilitate the commission of a felony offense . . .") (emphasis added); U.S.S.G. § 2K1.3(b)(2) ("If the offense involved any explosive material that the defendant *knew* or *had reason to believe* was stolen . . .") (emphasis added); U.S.S.G. § 2K1.3(b)(3) ("If the defendant *used* or possessed . . . any explosive material with *knowledge, intent*, or *reason to believe* that it would be *used* or possessed in connection with another felony offense . . .") (emphasis added); U.S.S.G. § 2K1.3(c)(1) ("If defendant . . . possessed or transferred any explosive material with *knowledge* or *intent* that it would be *used* or possessed in connection with another offense . . .") (emphasis added); U.S.S.G. § 2K1.4(a)(1) ("[I]f the offense (A) created a substantial risk of death or serious bodily injury to any person . . ., and that risk was created *knowingly* . . .") (emphasis added); U.S.S.G. § 2K1.4(c)(1) ("If . . . the offense was *intended* to cause death or serious bodily injury . . .") (emphasis added); U.S.S.G. § 2K1.5(b)(1) ("If the offense was committed *willfully* and *without regard for the safety of human life*, or with *reckless disregard* for the safety of human life . . .") (emphasis added); U.S.S.G. § 2K1.5(a)(3) ("If . . . he acted with mere *negligence* . . .") (emphasis added).

the drafters did not wish such a requirement to apply."); *cf. United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997) ("As a straightforward matter of textual interpretation, we will not presume that a statutory crime requires specific intent in the absence of language to that effect."). The fact that the guideline drafters specifically used mens rea language in § 2L1.1 and not in § 2L1.2 indicates they did not intend the term "intentional" to be included before "use" for purposes of § 2L1.2.

Furthermore, interpreting "use" to mean "intentional use" in every sentencing guideline, in accordance with the court's opinion, leads to curious results. For example, applying the reasoning of the court's opinion to U.S.S.G. § 2K1.3(b)(3) and inserting the mens rea element "intentional" before the verb "use" would change § 2K1.3(b)(3) to: "If the defendant [intentionally] used or possessed . . . any explosive material with knowledge, intent, or reason to believe that it would be [intentionally] used or possessed in connection with another felony offense. . . ." Thus, the court's opinion makes the mens rea language purposely included by the Sentencing Commission in this guideline superfluous,[4]

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[4] The court's opinion claims "we would effectively nullify the state of mind required by 'attempted use' and 'threatened use' " in the § 2L1.2 crime of violence definition by not reading a mens rea requirement into the meaning of the term use because "attempt and threat require intent." An "attempted use" or "threatened use" of force is a discrete action and by definition is not the "use" of force. As the definitions cited in the court's opinion indicate, "intent" is specifically included in the terms "attempt" and "threat." *See* BLACK'S LAW DICTIONARY 127 (6th ed. 1990) (defining attempt as "[a]n *intent* to commit a crime couple with an act taken toward committing the offense") (emphasis added); BLACK'S LAW DICTIONARY 1480 (6th ed. 1990) (defining threat

and departs from clear precedent governing statutory construction. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal citations omitted); *United States v. Marek*, 198 F.3d 532, 536 (5th Cir. 1999) ("A statute should be interpreted so as to give each provision significance.") (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S. Ct. 1011, 117 L.Ed.2d 181 (1992)); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part would be inoperative or superfluous.").

To justify its holding that "use" means "intentional use," the court's opinion cites to various dictionary definitions. However, by exclusively relying on dictionary definitions, the court's opinion ignores the Sentencing Commission's understanding of the term "use" as demonstrated by other guidelines, and disregards clear Supreme Court precedent requiring that the meaning of a statutory provision must be determined within the context of the whole act and not in isolation. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of*

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as "a communicated *intent* to inflict physical or other harm on any person or property") (emphasis added). Intent, however, is not specifically included in the verb "use" itself. The absence of a mens rea associated with the "use of force" does not mean force cannot be used intentionally, rather it means that force can be used negligently, recklessly, *or* intentionally. *See, e.g.*, Tex. Penal Code Ann. § 49.07(a)(1) (Vernon 1994) (defining Texas intoxication assault as the situation where a defendant "by *accident or mistake* . . . while operating a motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another.")

Am., Inc., 508 U.S. 439, 455, 113 S. Ct. 2173, 124 L.Ed.2d 402 (1993) ("Over and over we have stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1849)). I do not dispute that dictionaries are useful tools that assist this court in determining the plain meaning of ambiguous terms. However, before deciding that a term is ambiguous and turning to outside sources we must consider whether other provisions within a particular statute lend clarity to that term. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S. Ct. 570, 116 L.Ed.2d 578 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.") (internal citations omitted); *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

The meaning of a term should be determined by considering its context within the whole statute in which the term appears. This is a more appropriate indication of what the drafters of that statute understood a particular term to mean than is an outside dictionary definition. This is especially true in the case of the Sentencing Guidelines because the Commission has extensive expertise in this area, promulgates the guidelines in an effort to implement a cohesive policy, and constantly revises the guidelines in an effort to maintain internal consistency. As the preceding discussion indicates, there is no ambiguity surrounding the term

"use" when the Sentencing Guidelines are considered as a whole. It is clear that the Sentencing Commission does not understand the verb "use" to inherently include any mens rea element. Thus, this Court should not impose a mens rea element upon that verb when the Sentencing Commission has declined to explicitly do so.

In addition to misapplying fundamental principles of statutory construction, the reliance by the court's opinion upon *Chapa-Garza* is misguided. First, *Chapa-Garza* held that "use" means "intentional use" within the context of the 2000 version of U.S.S.G. § 2L1.2's definition of a crime of violence, not under the revised 2001 version of this guideline. *Chapa-Garza*, 243 F.3d at 923. Unlike the 2001 version of § 2L1.2, the 2000 version did not contain its own guideline-specific definition of a crime of violence. Instead, the 2000 definition was found, through a series of cross-references, in 18 U.S.C. § 16. The only portion of the definition considered in *Chapa-Garza* was 18 U.S.C. § 16(b). *See Chapa-Garza*, 243 F.3d at 924. Section 16(b) provides that in addition to the offenses described in § 16(a), this crime of violence definition also includes offenses where there was a "substantial risk that physical force . . . may be used." 18 U.S.C. § 16(b). Based upon this language, *Chapa-Garza* held that a crime of violence occurred when there is "a substantial likelihood that the perpetrator will intentionally employ physical force." *Chapa-Garza*, 243 F.3d at 926. The § 16(b) "substantial risk that physical force . . . may be used" language is different from the "use . . . of physical force" language found in the 2001 § 2L1.2 crime of violence definition. Furthermore, the purposes served by these two clauses, as demonstrated by the statutory structure of

their respective definitions, are not comparable.[5] Thus, our past interpretation of 18 U.S.C. § 16(b) in *Chapa-Garza* should not control our interpretation of the "use of force" language from the first part of the 2001 crime of violence definition in this case.

Second, under the rationale of *Chapa-Garza*, the nature of the 2001 revision of § 2L1.2 counsels against relying upon previous interpretations of 18 U.S.C. § 16 in this case. *Cf. Chapa-Garza*, 243 F.3d at 926. In *Chapa-Garza* we refused to interpret the crime of violence definition in 18 U.S.C. § 16(b) consistently with

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[5] Section 16 and § 2L1.2 are two of the eight versions of a "crime of violence" definition in the United States Code and in the United States Sentencing Guidelines. *See United States v. Charles*, 301 F.3d 309, 316 (5th Cir. 2002) (*en banc*) (DeMoss J. concurring). These crime of violence definitions usually have a similar two part structure. Like § 16 and § 2L1.2, the first part usually contains some version of the "use, attempted use, or threatened use of [ ] force" language with slight modifications. The second part differs among the definitions, modifying the first part in varying ways. Some of "these definitions are closed-ended and self-contained; and others of these definitions have catch-all clauses which invite speculation." *Id.* Guideline 2L1.2 is an example of the category of definitions where the second part is closed-ended while § 16(b) is an example of a second part containing a catch-all clause inviting speculation. Accordingly, the purpose of the "use of force" language in the first part of the § 2L1.2 definition is different from the language in the second part of 18 U.S.C. § 16. Relying upon *Chapa-Garza* in this case ignores the purpose served by the separate components of a crime of violence definition. Although the confusion caused by these various definitions is regrettable, "blame for this state of disarray falls squarely on the shoulders of Congress . . . and on the Sentencing Commission," and "[i]t is not the task of the Judicial Branch to say which of these varying definitions the Congress intended to be controlling; nor is it the task of the Judicial Branch to make specific what Congress has failed to specify." *Charles*, 301 F.3d at 316.

previous interpretations of the U.S.S.G. § 4B1.2(a) crime of violence definition. *Chapa-Garza*, 243 F.3d at 926. We held that comparison was inappropriate because the Sentencing Commission had previously changed the U.S.S.G. § 4B1.2(a) crime of violence definition from a cross reference to 18 U.S.C. § 16 to a self-contained definition. *Chapa-Garza*, 243 F.3d at 926. Yet, the court's opinion in this case ignores the Sentencing Commission's choice to replace a cross reference to § 16 with a self-contained crime of violence definition in § 2L1.2. It found no significant difference between the two guidelines, thus going against the rationale expressed in *Chapa-Garza*.[6]

Third, reliance upon *Chapa-Garza* for the proposition that "use" means "intentional use" disregards the impact of the revised structure of § 2L1.2. In the Sentencing Commission's effort to create a more graduated sentence enhancement system under U.S.S.G. § 2L1.2, the Commission included four separate enhancement levels in the 2001 version of the guideline rather than

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[6] Based upon the rationale of *Chapa-Garza*, it is even more appropriate to distinguish the 2001 § 2L1.2 crime of violence definition from the 18 U.S.C. § 16 crime of violence definition because there are more significant differences between these definitions than between those considered in *Chapa-Garza* itself. Specifically, the language of U.S.S.G. § 4B1.2(a), which *Chapa-Garza* distinguished, is closer to that of 18 U.S.C. § 16 than 18 U.S.C. § 16 is to the language of the crime of violence definition in the 2001 version of U.S.S.G. § 2L1.2. *See* U.S.S.G. § 2L1.2, cmt. n.1(B)(ii)(II). *But see* U.S.S.G. § 4B1.2(a)(2) (including within the definition, in addition to the listed crimes, other crimes which "present[ ] a serious risk of physical injury"); 18 U.S.C. § 16(b) (including within the definition additional crimes involving a "substantial risk that physical force . . . may be used," and not listing any specific offenses).

the two separate enhancement levels contained in the 2000 version. *See* U.S.S.G. App. C, amend. 632; *see also United States v. Caicedo-Cuero*, 312 F.3d 697, 709-11 (5th Cir. 2002) (discussing the 2001 amendments to § 2L1.2's definition of "crime of violence" and the impact of having multiple definitions of the same term within the same guideline). The aggravated felony definition of 8 U.S.C. § 1101(a)(43), and its cross reference to the 18 U.S.C. § 16 crime of violence definition, included in the 2000 version of § 2L1.2 were retained, but the Commission reduced the sentencing enhancement for an aggravated felony from 16 levels to 8 levels. U.S.S.G. § 2L1.2(b)(1)(C), cmt. n.2 (2001). As previously discussed, this crime of violence definition was the one *Chapa-Garza* interpreted. The Commission then added new definitions for those crimes serious enough to merit a 16-level enhancement, including the crime of violence definition at issue in this case. It is clear that the Commission intended these definitions to have different meanings because it drafted a new crime of violence definition, retained the prior aggravated felony definition, and assigned different sentence enhancements to each definition. Thus, the court's opinion counteracts the Commission's efforts by relying on the *Chapa-Garza* definition of use, which interprets a statutory definition that the revised structure of the guidelines indicates does not have the same meaning as the crime of violence definition in this case.

Without a mens rea element inappropriately added to the term "use" in U.S.S.G. § 2L1.2, it becomes clear that Vargas-Duran's underlying conviction for felony intoxication assault is a "crime of violence" for purposes of the 16-level enhancement in § 2L1.2(b)(1)(A). Intoxication assault punishes a defendant if "by accident or

mistake . . . while operating a motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another." Tex. Penal Code Ann. § 49.07(a)(1) (Vernon 1994). "Serious bodily injury" is defined as "injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code Ann. § 49.07(b) (Vernon 1994).

Intoxication assault involves the use of force. As the Eighth Circuit recently recognized in an automobile homicide case, "use of force" involves two components —use and force. *Gonzalez-Lopez*, 335 F.3d at 798-99. An automobile by its very nature embodies force. *Id.* (citing *Omar v. I.N.S.*, 298 F.3d 710, 717 (8th Cir. 2002) ("[A] vehicle can exert considerable physical force because of its structure, weight and capacity for motion and velocity.")). Furthermore, the drunk driver is clearly using and employing the force embodied in the motor vehicle by operating it. *Gonzalez-Lopez*, 335 F.3d at 799. Finally, the state intoxication assault statute ties the drunk driver's use together with the force of the automobile through its requirement that the "serious bodily injury" result from the driver's intoxication "while operating the motor vehicle." Tex. Penal Code Ann. § 49.07 (Vernon 1994). *Cf. Gonzalez-Lopez*, 335 F.3d at 799 (holding that a statute's requirement that a driver cause the death of another "ties the use of physical force [of the automobile] with the requirement that the force be used against another person").

The actions punished by the intoxication assault statute involve instances where the defendant drove his car while drunk and hit a pedestrian, another vehicle, or

a stationary object causing serious bodily harm to another. In the hands of a drunk, a motor vehicle is as likely to inflict physical force as a firearm.[7] There are no Texas state law cases where intoxication assault was prosecuted and actual force was not used to cause the injury.[8] Even Vargas-Duran admitted in his briefs to this Court that he could not find any Texas intoxication assault case that did not involve one of these scenarios. The most attenuated intoxication assault fact pattern actually prosecuted was the situation where a drunk

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[7] "Alcohol-involved crashes resulted in 16,792 fatalities, 513,000 nonfatal injuries, and $50.9 billion in economic costs in 2000, accounting for 22 percent of all crash costs." Lawrence J. Blincoe et al., National Highway Traffic Safety Administration, The Economic Impact of Motor Vehicle Crashes 2000 at 2 (2002) *at* http://www.nhtsa.dot.gov/people/economic/EconImpact2000/EconomicImpact.pdf (last visited Nov. 21, 2003). Furthermore, in Texas 1,745 of the 3,725 traffic fatalities were alcohol related in the year 2002. National Highway Traffic Safety Administration, 2002 Annual Assessment of Motor Vehicle Crashes 29, 50 (2002) *at* http://www.nrd.nhtsa.dot.gov/pdf/nrd30/NCSA/Rpts/2003/Assess02BW.pdf (last visited Nov. 21, 2003). Firearm related fatalities accounted for 28,663 deaths nationwide in the year 2000. Center for Disease Control, Deaths: Final Data for 2000, 50 National Vital Statistics Reports No. 15 at tbl.18 (2002) *at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_15.pdf (last visited Nov. 21, 2003). Of the 28,663 firearm related fatalities nationwide 1,972 occurred in the state of Texas. Bureau of Vital Statistics, Texas Department of Health, 2000 Annual Report tbl. 18 *at* http://www.tdh.state.tx.us/bvs/stats00/ANNR_HTM/00t18.HTM (last visited Nov. 21, 2003).

[8] Vargas-Duran's conviction is the quintessential Texas intoxication assault case. Vargas-Duran was driving while intoxicated, struck a pedestrian who was attempting to cross the street, and fled the scene. Thus Vargas-Duran caused the precise harm the Texas intoxication assault statute seeks to avoid. By striking a pedestrian with a motor vehicle Vargas-Duran certainly used force to cause a serious bodily injury.

driver ran his car into a parked vehicle, and the parked vehicle then struck a small child causing serious injuries. *See Gonzalez v. Texas*, No. 14-99-00853-CR, 2000 WL 1721159, at *1 (Tex.App.Houston [14th Dist.] Oct. 12, 2000, no pet.) (not designated for publication). Clearly, even in this situation the defendant used force to cause physical harm. The Texas intoxication assault statute punishes an intoxicated driver for causing serious bodily injury to another by reason of their operation of a motor vehicle, thus the statute fulfills the "use of force" requirement and is a crime of violence for purposes of the 16-level enhancement in U.S.S.G. § 2L1.2.

In summary, this Court's decision abrogates the Sentencing Commission's authority, properly delegated by Congress, to establish the mens rea required for each sentencing guideline. The Sentencing Commission could have included the mens rea element of intent in U.S.S.G. § 2L1.2, but the language of that guideline indicates that it did not choose to do so. Moreover, the court's decision contradicts the rationale of our prior cases interpreting the Sentencing Guidelines. Accordingly, I respectfully DISSENT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20116

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ENRIQUE VARGAS-DURAN, DEFENDANT-APPELLANT

Jan. 16, 2003

Before: EMILIO M. GARZA and CLEMENT, Circuit Judges, and HUDSPETH,* District Judge.

EMILIO M. GARZA, Circuit Judge:

Enrique Vargas-Duran appeals the district court's determination that his Texas conviction for intoxication assault was a "crime of violence" for purposes of the 16-level sentencing enhancement under § 2L1.2(b)(1)(A)(ii) of the 2001 version of the United States Sentencing Guidelines. Vargas-Duran contends that, in light of our decision in *United States v. Chapa-Garza*, 243 F.3d 921

* District Judge of the Western District of Texas, sitting by designation.

(5th Cir. 2001), his prior conviction for intoxication assault is not a "crime of violence" under § 2L1.2(b)(1)(A)(ii) because it does not have as an element the intentional use of force against a person.[1] We disagree.

Vargas-Duran, a citizen of Mexico, was discovered in the United States after being arrested for driving while intoxicated. He had previously been deported following Texas felony convictions for burglary of a vehicle and intoxication assault. Vargas-Duran pled guilty to being unlawfully present in the United States in violation of 8 U.S.C. § 1326(a) and (b)(2). At sentencing, he objected to the categorization of his 1996 intoxication assault conviction as a "crime of violence" for the purposes of the 16-level enhancement under § 2L1.2(b)(1)(A)(ii) of the 2001 version of the Sentencing Guidelines. The

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[1] Vargas-Duran also contends, solely for the purpose of preserving the issue for further appeal, that the "aggravated felony" provision of 8 U.S.C. § 1326(b)(2) is unconstitutional in the wake of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). He concedes that this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which *Apprendi* expressly declined to overrule. *See Apprendi*, 530 U.S. at 489-90, 120 S. Ct. 2348 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today . . . .") (footnote omitted). Thus, no further consideration is necessary. *See United States v. Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000) ("'The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless and until the Supreme Court itself determines to overrule it.'") (quoting *Hopwood v. Texas*, 84 F.3d 720, 722 (5th Cir. 1996)).

district court overruled the objection and sentenced him to sixty-four months of imprisonment and three years of supervised release.

We follow both the Sentencing Guidelines and their accompanying policy statements. *See United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir. 2002) (citing *Mistretta v. United States*, 488 U.S. 361, 391, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989), and *Williams v. United States*, 503 U.S. 193, 199-201, 112 S. Ct. 1112, 117 L.Ed.2d 341 (1992)). In addition, we give the Sentencing Guidelines' commentary controlling weight unless it is plainly erroneous or inconsistent with the guidelines themselves. *See id.* (citing *Stinson v. United States*, 508 U.S. 36, 42-45, 113 S. Ct. 1913, 123 L.Ed.2d 598 (1993)). We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Charles*, 301 F.3d 309, 312-13 (5th Cir. 2002) (en banc).

Under the 2001 version of § 2L1.2, a prior offense qualifies as a "crime of violence" for purposes of the 16-level sentencing enhancement if it is either "an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another" or an offense enumerated in Application Note 1(B)(ii)(II). U.S. SENTENCING GUIDELINES MANUAL ("U.S.S.G."), § 2L1.2, cmt. n. 1(B)(ii); *see United States v. Rayo-Valdez*, 302 F.3d 314, 316 (5th Cir. 2002) ("The language of § 2L1.2 says that 'crime of violence' means that which is in subparagraph I, and includes that which is in subparagraph II.").[2] Because intoxication assault is not

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[2] These offenses are "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a

one of the offenses enumerated in Application Note 1(B)(ii)(II), it is a "crime of violence" under § 2L1.2(b)(1)(A)(ii) only if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Rayo-Valdez*, 302 F.3d at 316. We need not discuss the facts underlying Vargas-Duran's prior conviction, since we "look only to the fact of conviction and the statutory definition of the prior offense" to determine whether a prior conviction qualifies as a predicate offense for sentencing enhancement purposes. *Taylor v. United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990). "Congress did not intend sentencing hearings to become retrials of the underlying conduct involved in the defendant's prior federal or state convictions." *United States v. Velazquez-Overa*, 100 F.3d 418, 421 (5th Cir. 1996).

Because the Texas offense of intoxication assault requires proof that an intoxicated offender "cause[] serious bodily injury to another," Tex. Penal Code Ann. § 49.07 (Vernon 1994),[3] we conclude that it has as an element the *use* of force against the person of another. Clearly, the requirement that the offender "cause[]

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minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." U.S.S.G., § 2L1.2, cmt. n. 1(B)(ii).

[3] Under the version of § 49.07 of the Texas Penal Code in effect at the time of Vargas-Duran's conviction, a defendant is guilty of a third degree felony if he or she "by accident or mistake, while operating an aircraft, watercraft, or motor vehicle in a public place while intoxicated, by reason of that intoxication cause[d] serious bodily injury to another." Tex. Penal Code Ann. § 49.07 (Vernon 1994). Following Vargas-Duran's conviction, § 49.07 was amended to include serious bodily injuries caused by operating or assembling an amusement ride while intoxicated. Tex. Penal Code Ann. § 49.07 (Vernon Supp. 2003). This revision does not apply to the instant matter, nor does it affect our analysis.

serious bodily injury" encompasses a requirement that the offender use force to cause that injury. Vargas-Duran has not demonstrated that an offender could be convicted under § 49.07 for causing "serious bodily injury" without actually using physical force against a person. We have not found any Texas decision in which an offender caused serious bodily injury without using force. In *Gonzalez v. Texas*, 2000 WL 1721159 (Tex. App. Houston [14th Dist.] Oct. 12, 2000, no pet.), the only decision cited by Vargas-Duran in support of his argument, the Texas Court of Appeals affirmed the defendant's conviction for intoxication assault where he drove his vehicle into a parked car, which in turn struck a child standing nearby. *Id.* at *1. Contrary to Vargas-Duran's contention, the defendant in *Gonzalez* clearly used force, albeit indirectly, against the person of another. Because causing "serious bodily injury" qualifies as using force, we conclude that intoxication assault as defined by the 1994 version of § 49.07 is a crime of violence for purposes of the 16-level enhancement under Application Note 1(B)(ii)(I) to the 2001 version of § 2L1.2.[4]

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[4] The dissent posits that this conclusion is in conflict with our decision in *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002). We perceive no conflict, however, because *Gracia- Cantu*, which was decided under the prior version of § 2L1.2, stated only that:

> Gracia-Cantu persuasively argues that his prior offense does not constitute a crime of violence under 18 U.S.C. § 16(a) because section 22.04(a) of the Texas Penal Code, the statute criminalizing injury to a child, does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child. Rather, section 22.04(a) is results-oriented in that the culpable mental state must relate to the result of a defendant's conduct rather than to the

Vargas-Duran contends that, because his prior conviction does not have as an element the *intentional* use of physical force, it is not a "crime of violence" for purposes of § 2L1.2(b)(1)(A)(ii). In support of his position, Vargas-Duran relies on our decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001), in which we applied a categorical approach and held that a Texas felony conviction for driving while intoxicated (DWI) was not a "crime of violence" under 18 U.S.C. § 16(b) because the offense did not involve "recklessness as regards the substantial likelihood that the offender will intentionally employ force against the person or property of another in order to effectuate the commission of the offense." 243 F.3d at 927.

Perhaps the obvious should be stated first: *Chapa-Garza* did not apply the current version of § 2L1.2. Section 2L1.2 was substantially revised after we decided *Chapa-Garza*, and the definition of "crime of violence" at issue in *Chapa-Garza* is not the same as the definition at issue here. *See United States v. Caicedo-Cuero*, 312 F.3d 697, 709-11 (5th Cir. 2002) (discussing the 2001 amendments to § 2L1.2's definition of "crime of violence"). Section 16(b), from which *Chapa-Garza* gleaned a state of mind requirement, 243 F.3d at 925-27,

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conduct itself. The government concedes that, because the statutory definition of the offense does not explicitly require the application of force as an element, 18 U.S.C. § 16(a) does not apply to Gracia-Cantu's offense of injury to a child. Accordingly, we need not consider the issue further.

302 F.3d at 311-12 (citation omitted). Importantly, in this case the Government does not concede that § 49.07 does not require the application of force as an element of the offense. Thus, the 16-level enhancement under § 2L1.2, according to the Government, applies to the Texas offense of intoxication assault.

no longer applies for purposes of the 16-level enhancement.[5]

Second, unlike intoxication assault, Texas felony DWI does not have as an element the use of force. "The crime of Texas felony DWI is committed when the defendant, after two prior DWI convictions, begins operating a vehicle while intoxicated." *Chapa-Garza*, 243 F.3d at 927. Third, *Chapa-Garza* did not analyze the Texas felony DWI statute under § 16(a), the language of which is similar to Application Note 1(B)(ii)(I). *Compare* 18 U.S.C. § 16(a) (covering any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another") *with* U.S.S.G., § 2L1.2, cmt. n. 1(B)(ii) (covering any "offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another"). The analysis in *Chapa-Garza* was instead based on the catch-all language of § 16(b), which applies to "any other offense that is a felony and that, by its

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[5] The pre-2001 version of § 2L1.2, which increased the base offense level by 16 for all prior "aggravated felony" convictions, was replaced with a sliding scale of enhancements based on the seriousness of the prior conviction. *See* U.S.S.G., Supplement to Appendix C, Amendment 632, at 222-25 (2001). The Sentencing Commission stated that this amendment responded to concerns that "the breadth of the definition of 'aggravated felony' " under § 2L1.2 "sometimes results in disproportionate penalties." *Id.* at 224. Significantly, the 2001 amendment to § 2L1.2 narrowed the definition of "crime of violence" for purposes of the 16-level enhancement by replacing the definition in § 16 with that in Application Note 1(B)(ii). However, the amended application notes for § 2L1.2 retain § 16's definition of "crime of violence" for purposes of the 8-level "aggravated felony" enhancement under § 2L1.2(b)(1)(C).

nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). In fact, *Chapa-Garza* noted that "18 U.S.C. § 16(b) is the *only* justification for the 16-level enhancement advanced by the government." 243 F.3d at 924 (emphasis added). *Chapa-Garza*'s analysis of § 16(b) would have been entirely unnecessary had the crime of Texas felony DWI contained as an element the "use of force," as does the Texas crime of intoxication assault at issue in this case.

We do not agree that *Chapa-Garza*'s interpretation of § 16(b)'s language applies in this context. As discussed above, unlike Texas felony DWI, intoxication assault has as an element the use of force, and therefore, unlike *Chapa-Garza*, we are not confined to analyzing whether this offense is a "crime of violence" under the catch-all language of § 16(b). We question whether *Chapa-Garza* would have read a state of mind requirement into the revised definition of "crime of violence" under Application Note 1(B)(ii) to the 2001 version of § 2L1.2.[6]

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[6] Other circuits have read a state of mind requirement into § 4B1.2, which defines "crime of violence" as including offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another." *See United States v. Rutherford*, 54 F.3d 370, 372-74 (7th Cir. 1995); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992). Vargas-Duran urges us to apply this interpretation to the language of Application Note 1(B)(ii)(I). However, we have never read a state of mind requirement into § 4B1.2. We therefore decline to impose a state of mind requirement in this context. Moreover, although *Parson* noted in unreasoned dicta that § 16(a) "requires specific intent to use force," 955 F.2d at 866, this does not persuade us that we must read a state of mind requirement into Application Note 1(B)(ii)(I). Courts

In light of the plain language of the revised guideline and its commentary, we decline to extend *Chapa-Garza*'s state of mind requirement. Nothing in the amended version of § 2L1.2 or its commentary indicates that the use of force must be intentional for a prior offense to qualify as a "crime of violence" for purposes of the 16-level enhancement. We must assume that the Sentencing Commission was aware of our holding in *Chapa-Garza* when it amended § 2L1.2 and would have explicitly incorporated a state of mind requirement had it intended to do so. It did not.[7] Absent explicit

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have reached varying determinations regarding the necessity of a state of mind requirement under § 16. *Compare United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) ("[T]he 'crime of violence' definitions do not require an intentional use of force, but they do require a volitional act."), *Dalton v. Ashcroft*, 257 F.3d 200, 206-08 (2d Cir. 2001) ("Although an accident may properly be said to involve force, one cannot be said to *use* force in an accident as one might use force to pry open a heavy, jammed door." (emphasis in original)), *and Bazan-Reyes v. I.N.S.*, 256 F.3d 600, 609-11 (7th Cir. 2001) ("[O]ur finding that the word 'use' requires volitional conduct prohibits a finding that drunk driving is a crime of violence under § 16(a).") *with Omar v. I.N.S.*, 298 F.3d 710, 720 (8th Cir. 2002) ("We reject Omar's claim that § 16(b) requires an element of intent for a crime of violence and his attempt to read more into the words 'may be used' than they can fairly support."), *Tapia Garcia v. I.N.S.*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (finding the Board of Immigration Appeals' decision that "the statutory definition of crime of violence in 18 U.S.C. § 16(b) does not require intentional conduct" reasonable), *and Le v. U.S. Attorney General*, 196 F.3d 1352, 1354 (11th Cir. 1999) (holding that prior conviction for causing serious bodily injury while driving under the influence was a "crime of violence" under § 16(a) "because one element of the offense includes the actual use of physical force").

[7] We also note that the Sentencing Commission did not include a catch-all provision similar to § 16(b) in the revised definition of "crime of violence" for the 16-level enhancement. Although the

direction, we will not read a state of mind requirement into the guideline. *See United States v. Fry*, 51 F.3d 543, 546 (5th Cir. 1995) (holding that, where "the language of section 2K2.1(a)(3) makes no reference to the defendant's mental state," "[t]he section is plain on its face and should not . . . be read to imply a scienter requirement."); *cf. United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997) ("As a straightforward matter of textual interpretation, we will not presume that a statutory crime requires specific intent in the absence of language to that effect.").[8]

Because the Texas crime of intoxication assault has as an element the use of force against the person of another, we conclude that the district court did not err

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dissent reasons that the definition of "crime of violence" in Application Note 1(B)(ii)(I) is a stronger candidate for imposing a state of mind requirement than that in § 16(b), only the broad catch-all language of § 16(b) requires narrowing. The dissent's reliance on dicta in a footnote in *Park v. I.N.S.*, 252 F.3d 1018 (9th Cir. 2001), is misplaced as *Park* rejected *Chapa-Garza*'s holding. *Id.* at 1024 n. 7 (concluding that "§ 16(b) . . . does not require that force be used intentionally.").

[8] Although the dissent posits that the words "use of physical force" should have the same meaning under all of the definitions of "crime of violence" incorporated by § 2L1.2, the panel in *Caicedo-Cuero* correctly noted:

> Although rendering the guideline less clear than is desirable, § 2L1.2's implication of two distinct definitions of drug trafficking crimes is neither repugnant to principles of statutory construction nor inconsistent with the Sentencing Commission's prior practice. Looking to a parallel situation within § 2L1.2, relating to the dual definitions of "crimes of violence," we note that the Sentencing Commission's practice of incorporating multiple definitions of the same term is, it turns out, not new.

312 F.3d at 708-09.

in imposing the 16-level enhancement. We therefore AFFIRM the sentence imposed by the district court.[9]

CLEMENT, Circuit Judge, dissenting:

Two reasonable propositions underlie the majority's decision: first, that one can *use force against another* without intending to use that force; and second, that a criminal statute's requirement that the defendant cause serious bodily harm also encompasses the requirement that the defendant *use force* to bring about the harm. Both premises are contrary to settled precedent. I respectfully dissent.

I. Conflict with *Chapa-Garza*

The majority concludes that it is possible for a crime to "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," U.S. Sentencing Guidelines Manual § 2L1.2 application note 1(B)(ii)(I) ("U.S.S.G."), even where the crime does not require the defendant to have *intentionally* used force. That conclusion collides with this Court's decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001), which held that a Texas felony DWI conviction was not a "crime of violence" for purposes of a neighboring Sentencing Guidelines subsection, also involving the interpretation of *using physical force against another.* We stated:

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[9] Vargas-Duran also contends that his intoxication assault and burglary convictions are not "aggravated felonies" for purposes of the 8-level enhancement under § 2L1.2(b)(1)(C). Because the district court correctly determined that the 16-level enhancement applied to the intoxication assault conviction, it never reached these arguments. Thus, we need not address this contention on appeal.

> The criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental, unintended event. THE AMERICAN HERITAGE COLLEGE DICTIONARY (3rd ed.1997) defines the verb "use" as:
>
> > "1. To put into service or apply for a purpose; employ. 2. To avail oneself of; practice: use caution. 3. To conduct oneself toward; treat or handle: used his colleagues well. 4. To seek or achieve an end by means of; exploit: felt he was being used. 5. To take or consume; partake of: She rarely used alcohol"
>
> The four relevant definitions indicate that "use" refers to volitional, *purposeful*, not accidental, employment of whatever is being "used".

Id. at 926 (emphasis in original). In a dissent from the denial of en banc rehearing in *Chapa-Garza*, Judge Barksdale, *joined by no other judge*, cited a different dictionary in disagreeing with the *Chapa-Garza* panel and arriving at the same conclusion underlying the majority's decision today: "It is true that 'use' may more often refer to the intentional use of force; but without question, force may be used accidentally." 262 F.3d 479, 482 (5th Cir. 2001) (Barksdale, J., dissenting) (footnote omitted).

The majority attempts to distinguish *Chapa-Garza* by pointing out, correctly, that the *Chapa-Garza* panel was interpreting 18 U.S.C. § 16(b),[1] which is somewhat

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[1] The issue in *Chapa-Garza* was whether the prior offense was an "aggravated felony" for purposes of a 16-level enhancement under Guideline § 2L1.2. 243 F.3d at 923. The definition of "aggravated felony" ultimately pointed to, among other things, the

different than Guideline § 2L1.2. *Compare* 18 U.S.C. § 16(b) ("any other offense that is a felony and that, by its nature, involves the substantial risk that physical force against the person or property of another may be used in the course of committing the offense") *with* U.S.S.G. § 2L1.2 application note 1(B)(ii)(I) ("an offense under federal, state, or local law that has an element the use, attempted use, or threatened use of physical force against the person of another"). In fact, § 2L1.2 is almost identical to § 16(b)'s neighbor, 18 U.S.C. § 16(a).[2]

Although § 16(b) is different (it only covers felonies, for instance), the dispositive language in *Chapa-Garza* was substantially identical to the language at issue here. The *Chapa-Garza* panel focused *only* on the phrase "physical force against the person or property of another may be used"; here, we are focused *only* on the phrase "use of physical force against the person of another." I see no difference between the two, except that the former pertains to property, as well as persons.

Considering the substantially identical phrasing, it is surprising that the majority "question[s] whether *Chapa-Garza* would have read a state of mind requirement into the revised definition of 'crime of violence'" "in § 2L1.2. *Maj. Op.* at 198. The *Chapa-Garza* panel,

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statutory definition of "crime of violence" in 18 U.S.C. § 16. *Id.* In 2001, the "aggravated felony" enhancement was reduced to eight levels, instead of 16, but the same definition applies. *See* U.S.S.G. app. C, comment to amend. 632 (2001).

[2] Section 16(a) defines "crime of violence" as an "offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another." (Emphasis added). The "or property" language is the only difference between the definitions. *Cf.* U.S.S.G. § 2.L1.2 application note 1(B)(ii)(I).

referencing a dictionary, determined the ordinary meaning of the *use of physical force against another* without looking to any of the neighboring language that might distinguish the context of § 2L1.2. It is specious to suppose that had the *Chapa-Garza* panel been faced with the "crime of violence" definition in § 2L1.2, the Court would have referenced a *different* dictionary (perhaps Judge Barksdale's) to define "use." Even more telling, the *Chapa-Garza* panel quotes with approval an excerpt from a Third Circuit case stating that "[u]se of physical force is an intentional act" for purposes of the nearly identical § 16(a). 243 F.3d at 926 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1993)).

Even if it were possible to distinguish § 2L1.2 and § 16(b) with respect to the meaning of *use of force against another*, § 2L1.2 is a much stronger candidate for the intentionality requirement, implying that, *a fortiori*, *Chapa-Garza* should control. First, § 2L1.2 examines the defendant's state of mind directly, whereas § 16(b), in the passive voice ("may be used in the course of committing the offense") focuses on the nature of the felony. *See Park v. INS*, 252 F.3d 1018, 1024 n. 7 (9th Cir. 2001) (explaining the possible difference between § 16(a) and § 16(b) with respect to intent). Second, unlike § 16(b), § 2L1.2 covers threatened and attempted uses of force. Since attempts and threats can only be intentional, *see* BLACK'S LAW DICTIONARY 123, 1489 (7th ed. 1999), their grouping alongside the *actual* use of force suggests that § 2L1.2 was meant to address intentional acts only. *See United States v. Rutherford*, 54 F.3d 370, 373 (7th Cir. 1995) (making the same point with respect to Guideline § 4B1.2). Third, the enhancement referencing § 16(b)'s

"crime of violence" is only eight levels, whereas the § 2L1.2 "crime of violence" definition is 16 levels. *Compare* U.S.S.G. § 2L1.2(b)(1)(A)(ii) *with* U.S.S.G. § 2L1.2(b)(1)(C). Thus, if only one of either § 2L1.2 or § 16(b) ought to require intent, it is the former, not the latter. Today's decision brings about precisely the opposite result.

Turning an ordinary statutory construction principle on its head, the majority relies on the fact that the Sentencing Commission recently revised § 2L1.2—but without explicitly incorporating the *Chapa-Garza* gloss—to suggest the Sentencing Commission intended to repudiate *Chapa-Garza*. It was the prevailing view of the courts of appeals at the time of the 2001 amendments that the *use of physical force against another* was limited to *intentional* use, for purposes of determining whether a crime was a crime of violence. *See Chapa-Garza*, 243 F.3d at 926; *Rutherford*, 54 F.3d at 372-73 (holding drunk driving assault not a "crime of violence" under Guideline § 4B1.1(a)(1)); *Parson*, 955 F.2d at 866 (noting that use of force is an intentional act for § 16(a) purposes). In *Rutherford*, for example, the Seventh Circuit interpreted Guideline § 4B1.2, which is substantially identical to § 2L1.2, as requiring the intentional use of force:

> Force is exerted in many instances where it is not employed for any particular purpose. For example, earthquakes and avalanches involve the exertion of a tremendous amount of force. Such disasters, however, are freaks of nature; we can identify no intelligence or purpose behind them. Referring to a randomly occurring avalanche as a "use" of force would torture the English language. Likewise, a drunk driving accident is not the result of plan,

> direction, or purpose but of recklessness at worst and misfortune at best. A drunk driver who injures a pedestrian would not describe the incident by saying he "used" his car to hurt someone. In ordinary English, the word "use" implies intentional availment.

54 F.3d at 372-73 (footnote omitted). Against the backdrop of *Chapa-Garza*, *Rutherford*, and *Parson*, and with zero cases to the contrary, it is unthinkable that the Sentencing Commission would have expected that the phrase "use of physical force against the person of another" to be interpreted as the majority has interpreted the phrase. This common sense observation is analogous to the familiar statutory interpretation principle that "'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. J.J. Curran*, 456 U.S. 353, 382 n. 66, 102 S. Ct. 1825, 72 L.Ed.2d 182 (1982) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975)); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979) (holding a private right of action under Title IX because, when enacted, the courts had already construed the critical language to have created one).

A recent case, *United States v. Caicedo-Cuero*, 312 F.3d 697, 706-11 (5th Cir. 2002), illustrates this principle, coincidentally, in the context of Guideline § 2L1.2. Caicedo-Cuero argued that, with the 2001 amendments, the *guideline* definition of "drug trafficking offense" was intended to supersede the broader *statutory* definition of "drug trafficking offense," even

though one subdivision of § 2L1.2 explicitly referenced the statute, instead of the guideline definition. *Id.* at 708. Caicedo-Cuero emphasized the peculiarity that, in imposing the enhancement he received, "a court would have to find that the defendant's prior conviction both *is and is not* a drug trafficking offense." *Id.* (emphasis in original).[3] In rejecting the argument, the Court pointed out that the same peculiarity exists with respect to the multiple definitions of "crime of violence," citing (coincidentally) *Chapa-Garza*. *Id.* at 707-11. The Court emphasized that the Sentencing Commission apparently approved of the peculiarity: "We presume that the sentencing Commission had knowledge of this practice when it drafted the 2001 amendments." *Id.* at 710.

Moreover, the notes accompanying the 2001 amendments to § 2L1.2 explicitly state that the amendments are intended to render moot an unrelated circuit split, *see* U.S.S.G. app. C, comment to amend. 632 (2001), further suggesting that the Sentencing Commission was aware of judicial interpretations but chose not to change them. Since *Chapa-Garza*, courts have adopted its interpretation of *use of physical force* with respect to § 16(a), a statute which, again, is virtually identical to the § 2L1.2 definition. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001) ("[T]he presence of the volitional 'use . . . against' require-

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[3] Caicedo-Cuero received an eight-level sentencing enhancement for having been convicted of an "aggravated felony" under Guideline § 2L1.2; in particular, he had committed a "drug trafficking offense" as defined in 18 U.S.C. § 924(c). *Id.* at 706. Guideline § 2L1.2 contains a *separate* 12-point enhancement for having been convicted of a "drug trafficking offense," as defined more narrowly in the guidelines. U.S.S.G. § 2L1.2 (2001).

ment in both prongs of 18 U.S.C. § 16 means that a defendant cannot commit a 'crime of violence' if he negligently—rather than intentionally or recklessly—hits someone or something with a physical object."); Bazan Reyes v. INS, 256 F.3d 600, 609 (7th Cir. 2001) ("Although a conviction for homicide by intoxicated use of a vehicle requires that the offender actually hit someone, it does not require that he intentionally used force to achieve that result . . . [t]herefore, application of § 16(a) to [defendant's] conviction is foreclosed. . . ."); *cf. Dalton v. Ashcroft*, 257 F.3d 200, 206 (2d Cir. 2001) (requiring intent under § 16(b)).

The practical result of today's decision is that the government need not show the intentional use of force for a prior offense to qualify for the 16-level "crime of violence" enhancement, but the government would be required to show the intentional use of force when an eight-level enhancement is sought under the "crime of violence" definition in § 16(b).[4] In other words, a *higher* showing of intentionality is now required to receive the *lesser* enhancement. Not only is that a confusing and backwards result, the signal it sends to the bench and bar is that the *same* statutory words used in the *same* context cannot be expected to be interpreted alike if the words appear in different sections.

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[4] The eight-level increase for having committed an "aggravated felony" eventually points to the "crime of violence" definition in 18 U.S.C. § 16. *See* U.S.S.G. § 2L1.2 application note 2 (defining "aggravated felony" by reference to 8 U.S.C. § 1101(a)(43)); *see also* 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" as, among other things, a "crime of violence" under 18 U.S.C. § 16). When *Chapa-Garza* was decided, the "aggravated felony" increase was 16 levels, instead of eight. *See* U.S.S.G. app. C, comment to amend. 632 (2001).

Finally, today's holding will multiply the irrationality of having several definitions of "crime of violence" scattered throughout the U.S.Code and Sentencing Guidelines. *See United States v. Charles*, 301 F.3d 309, 315-16 (5th Cir. 2002) (en banc) (DeMoss, J., specially concurring). By my count, there are no less than *sixteen* instances where the *use of physical force against another* phrasing is used in various definitions in different contexts. *See* 18 U.S.C. § 16 ("crime of violence"); 18 U.S.C. § 521(c)(2) ("criminal street gang"); 18 U.S.C. § 921(1)(33)(A) ("misdemeanor crime of domestic violence"); 18 U.S.C. § 922(d)(8)(B)(ii) (to whom it is prohibited to sell firearms); 18 U.S.C. § 922(g)(8)(C)(ii) (who is prohibited from shipping, transporting, or possessing firearms); 18 U.S.C. § 924(c)(3) ("crime of violence" in firearms offense penalties); 18 U.S.C. § 924(e)(2)(B) ("violent felony" in firearms offense penalties); 18 U.S.C. § 3156(a)(4) ("crime of violence" in release and detention procedures); 18 U.S.C. § 373 ("solicitation to commit a crime of violence"); 18 U.S.C. § 3559 ("serious violent felony"); 18 U.S.C. § 5032 (when a juvenile may be subject to criminal prosecution); 28 U.S.C. § 540A(c)(1) ("felony crime of violence" for travelers); 21st Century Department of Justice Appropriations Authorization Act, Pub.L. No. 107-273, § 2953, 116 Stat. 1758, 1795- 95 (2002) ("violent offender" in law enforcement appropriations); Fed. R. Crim. P. 32 ("crime of violence or sexual abuse" in sentencing procedures); U.S.S.G. § 2G1.1(b) (specific offense characteristics of sex crimes); U.S.S.G. § 2L1.2 application note 1(B)(ii) ("crime of violence" for specific offense characteristics of unlawfully remaining or entering the United States); U.S.S.G. § 4B1.2(a) ("crime of violence" in career offender provision). Today's decision sends mixed

signals to the bench and bar as to the proper interpretation of those provisions. At the very least, the phrasing *use of physical force against another* should be interpreted the same under the various definitions of "crime of violence" within the Sentencing Guidelines. Today's decision calls into question even that most basic coherence.

II. Conflict with *Gracia-Cantu*

In *United States v. Gracia-Cantu*, this Court held that the Texas crime of causing injury to a child was not a "crime of violence" under 18 U.S.C. § 16(a)—again, which is virtually identical to the § 2L1.2 definition —because the "results-oriented" crime does not have as an element the use of force against a person. 302 F.3d 308, 311-12 (5th Cir. 2002). We stated:

> Gracia-Cantu persuasively argues that his prior offense does not constitute a crime of violence under 18 U.S.C. § 16(a) because section 22.04(a) of the Texas Penal Code, the statute criminalizing injury to a child, does not require that the perpetrator actually use, attempt to use, or threaten to use physical force against a child. Rather, section 22.04(a) is results-oriented in that the culpable mental state must relate to the result of a defendant's conduct rather than to the conduct itself.

Id. Vargas-Duran was convicted of intoxication assault, which, just like the injury to a child statute, is "results-oriented." *Compare* Texas Penal Code Ann. § 49.07 (Vernon 1994) (intoxication assault) *with* Tex. Penal Code Ann. § 22.04(a) (Vernon 2002) (injury to a child). That is, neither statute mentions using force; both penalize *causing* injury. *Id.*

One possible distinction between the statutes is that it is easy to imagine cases where a child is injured *without* force (neglect, for instance), but it is a bit more difficult to imagine cases where a drunk driver causes serious bodily injury without force. Surely most intoxication assault prosecutions involve a collision, and hence, some force. Nevertheless, the statute does not *require* that the defendant use force. For instance, if a drunk driver swerves off the road, causing a pedestrian to dive into a ditch and become seriously injured, the Texas statute is doubtlessly violated, even though there has been no actual application of force to anyone. Consider also the case where a drunk driver's near miss causes a heart attack. In this respect, today's decision cannot be squared with *Gracia-Cantu*.

III. Conclusion

Although I might find the majority's arguments persuasive were we writing on a clean slate or deciding the case en banc, precedent compels me to vote otherwise. I respectfully dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20116

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ENRIQUE VARGAS-DURAN, DEFENDANT-APPELLANT

June 26, 2003

ON PETITION FOR REHEARING EN BANC

Before: KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DEMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

(2)

Supreme Court, U.S.
FILED
JUN 17 2004
OFFICE OF THE CLERK

No. 03-1514

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ENRIQUE VARGAS-DURAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 03-1514

UNITED STATES OF AMERICA, PETITIONER

v.

ENRIQUE VARGAS-DURAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent provides no sufficient reason for denying the petition rather than holding it pending the decision in *Leocal* v. *Ashcroft*, cert. granted, No. 03-583 (Feb. 23, 2004), and then disposing of it accordingly.*

1. Respondent identifies three differences between the definition of "crime of violence" in 18 U.S.C. 16 and

* As the brief in opposition notes (at 1), the district court resentenced respondent to 30 months of imprisonment on February 3, 2004, in accordance with the mandate of the court of appeals. See Br. in Opp. App. 1-2. We have been informed by the Department of Homeland Security, Immigration and Customs Enforcement, that he was removed to Mexico two weeks later. Respondent's removal does not render the case moot, because, if the original 64-month sentence is reinstated, he could be required to serve the remainder of the sentence in the event that he reentered the United States. See, *e.g.*, *United States* v. *Orrega*, 363 F.3d 1093, 1095-1096 (11th Cir. 2004) (citing cases from other circuits). Cf. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983).

the definition of that term in Sentencing Guidelines § 2L1.2. Br. in Opp. 4-5. He contends that, because of these differences, the Court's interpretation of 18 U.S.C. 16 in *Leocal* "will clearly be of extremely limited, or no, value" in interpreting Sentencing Guidelines § 2L1.2. Br. in Opp. 5. Respondent is mistaken.

The first two differences between the statute and the Guideline are that the former, but not the latter, encompasses force against the "property" as well as the person of another, and that the latter, but not the former, includes a list of offenses that are always crimes of violence. Br. in Opp. 4-5. Because the crime at issue in this case and *Leocal*—causing serious bodily injury while driving under the influence of alcohol—is not one of those enumerated in the Guideline's definition of "crime of violence," and because it does not involve damage to property, these differences are immaterial.

The third difference between the statute and the Guideline is that the former, but not the latter, includes an alternative definition of "crime of violence." The statutory definition encompasses not only an offense that "has as an element the use * * * of physical force against the person * * * of another" (18 U.S.C. 16(a)), but also a felony offense that, "by its nature," involves a "substantial risk" that physical force "may be used" in committing the offense (18 U.S.C. 16(b)). This difference is not a reason to deny certiorari either, because it cannot be known in advance whether the Court will decide *Leocal* on the sole basis of the alternative definition (Section 16(b)) without addressing whether the crime at issue satisfies the definition that is nearly identical to the Guideline's definition (Section 16(a)). And even if the Court were to decide the case on the basis of Section 16(b) alone, its decision could still be relevant to whether the court of appeals correctly

interpreted the Guideline, because the Court might hold that the "use" of force under Section 16(b) need not be intentional, and that interpretation of "use" would be relevant to the meaning of the same term in Section 16(a).

As additional support for the argument that the decision in *Leocal* will provide little assistance in interpreting Sentencing Guidelines § 2L1.2, respondent contends that there is "absolutely no indication" that, in defining "crime of violence" as it did in Section 2L1.2, "the Sentencing Commission intended in any way to incorporate or reference the concerns leading to the enactment of 18 U.S.C. § 16." Br. in Opp. 5. But the best evidence of the Commission's intent is the language it used in the definition, and the meaning of identical language in the statutory definition of the same term is therefore highly relevant to the question of the Commission's intent in defining "crime of violence" in Section 2L1.2. Respondent asserts that "the available history reflects that the Sentencing Commission's design in drafting this provision was to ***distinguish*** it from 18 U.S.C. § 16" (Br. in Opp. 5), but the history he cites—Guidelines Amendment 632—says nothing at all about the meaning of "crime of violence" in Section 2L1.2, much less that the Guideline's definition differs from that in 18 U.S.C. 16.

Respondent finds it "ironic" that, in a case in which there is only an "attenuated" connection between the Guideline and the statute, the government is arguing for an exception to the general rule against certiorari review of decisions interpreting a Guideline, because the government invoked the general rule in opposing certiorari in *Leal-Rivera* v. *United States*, cert. denied, No. 03-5434 (Nov. 17, 2003), a case in which "the Guidelines term directly incorporated by reference [a] sta-

tutory term." Br. in Opp. 6 n.1. Unlike *Leal-Rivera*, however, this case is not one in which the Court is being asked to grant certiorari to engage in a "substantive interpretation" of a Guideline. *Id.* at 2, 3, 8. It is being asked only to hold the petition and then, depending on the outcome of a case in which certiorari has already been granted, either deny certiorari or grant certiorari for the limited purpose of vacating the judgment of the court of appeals and remanding for further consideration in light of the decision in that case.

2. Respondent next contends that, contrary to what the government says in the petition (Pet. 9), the Fifth Circuit's interpretation of Sentencing Guidelines § 2L1.2 "was not dependent upon that court's precedents interpreting [18 U.S.C.] § 16." Br. in Opp. 7. Respondent is again mistaken. In holding that an offense has as an element the "use" of force if the statute requires that the defendant intentionally availed himself of the force, the court of appeals relied on three things: text (dictionary definitions of "use"), Pet. App. 8a-10a; context (the juxtaposition in the Guideline of "use," "attempted use," and "threatened use"), *id.* at 10a; and precedent (Fifth Circuit cases interpreting "use" in 18 U.S.C. 16), Pet. App. 10a-13a. Thus, while Fifth Circuit case law on Section 16 was not the sole basis for the court's interpretation of Section 2L1.2, it certainly was one of the bases.

3. Respondent's final contention is that holding the petition until *Leocal* is decided will leave the law in the Fifth Circuit "unsettled" and "h[o]ld up" illegal-reentry cases there. Br. in Opp. 9. It is difficult to see how holding the petition will have that effect, since the pendency of a certiorari petition does not prevent district courts from imposing sentence, or Fifth Circuit panels from deciding appeals, in accordance with the decision

below in cases that are governed by it. It is true that there is some uncertainty about whether that decision will remain the law, and it is possible (if unlikely) that some courts in the Fifth Circuit might decide to hold a case in abeyance until the uncertainty is resolved. But the uncertainty is attributable to the pendency of *Leocal*, which could effectively overrule the decision below regardless of whether the petition is held.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Leocal* v. *Ashcroft*, No. 03-583, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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